No. 03-633

JUL 19 2004

IN THE

Supreme Court of the United States

DONALD P. ROPER, Superintendent,
Potosi Correctional Center,

Petitioner,

v.

CHRISTOPHER SIMMONS,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSOURI

BRIEF OF NEW YORK, IOWA, KANSAS, MARYLAND, MINNESOTA, NEW MEXICO, OREGON, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

Amici Curiae States urge affirmance of the Missouri Supreme Court's decision in *Simmons v. Roper*, 112 S.W.3d 397 (Mo. 2003) (en banc). That decision held that a national consensus forbidding execution of defendants who committed their crimes as 16- or 17-year-olds (hereinafter referred to as "juvenile offenders") has emerged in the fifteen years since this Court decided *Stanford v. Kentucky*, 492 U.S. 361 (1989), and that executing such persons therefore violates the Eighth Amendment's prohibition against cruel and unusual punishment.

Amici States New York, Iowa, Kansas, Maryland, Minnesota, New Mexico, Oregon, and West Virginia value highly the discretion accorded them by our federal system to punish crimes as they deem appropriate. Each State has crafted its own penal system to best protect the public safety of its citizens, in light of local concerns about crime and attitudes toward punishment. As part of this process, a number of Amici States, including New York, Kansas, Maryland, New Mexico, and Oregon have determined that capital punishment is essential to deterring particularly heinous crimes. These States have enacted statutes providing for the death penalty, and have vigorously defended their right to allow juries to impose it.

Amici States nonetheless recognize that the death penalty is subject to constitutional limitations that are grounded in the values of the nation's citizenry. As this Court has held, if an enduring national consensus emerges that a punishment is truly excessive, and thus inconsistent with evolving standards of decency, the Eighth Amendment precludes its continued use.

While the Court has held capital punishment itself to be constitutional under this measure, Amici States believe that the execution of offenders who were younger than 18 at the time they committed their crimes can no longer be sustained. It is their view that a national consensus, as evidenced by the enactments of state legislatures, has developed that is sufficiently widespread and consistent to preclude imposition of the death penalty on these offenders.

SUMMARY OF ARGUMENT

Under this Court's Eighth Amendment jurisprudence, a punishment is "cruel and unusual" if a consensus among the states forbids it. Fifteen years ago, this Court did not find such a consensus with regard to the execution of juvenile offenders; the day was yet to come "when there is such general legislative rejection" of these executions. *Stanford*, 492 U.S. at 381-82 (O'Connor, J., concurring).

Today, legislative rejection of juvenile executions is widespread, and legislatures that have changed their laws in recent years have moved in one direction. In the 15 years since *Stanford*, seven states plus the federal government have joined those states that previously prohibited juvenile executions, while no state has lowered its minimum age for capital punishment below 18. Today, 31 jurisdictions plus the federal government prohibit the execution of offenders who were less than 18 at the time they committed their crimes,[1] with 18 states explicitly setting 18 as the minimum age of eligibility.

1. Of those 31 jurisdictions, 12 states (Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin) do not permit the death penalty under any circumstances.

This legislative consensus likely will endure because it emerged after steady deliberation, over a long period of time – longer than that previously found by this Court to sufficiently reflect a national judgment. *See Atkins v. Virginia*, 536 U.S. 304 (2002). By 1989, the last time this Court considered the issue, 11 states already expressly prohibited juvenile executions.

A simultaneous trend in recent years toward tougher treatment of juvenile offenders confirms that the choice to bar these executions is deliberate and considered. As the states have moved toward prohibiting juvenile executions, they have also enacted stricter juvenile justice laws that expose juveniles to adult criminal liability. All of the 18 capital punishment states that expressly shield juvenile offenders from the death penalty require or allow juveniles charged with murder to be prosecuted as adults. That many states treat juveniles offenders like adults, but make an exception when it comes to capital punishment, reflects a considered judgment that death is inappropriate for juvenile offenders. This mitigates against any hazard of prematurely declaring juvenile executions "cruel and unusual."

ARGUMENT

AN ENDURING LEGISLATIVE CONSENSUS HAS EMERGED AGAINST EXECUTING JUVENILE OFFENDERS, RENDERING THESE EXECUTIONS UNCONSTITUTIONAL

While the government has significant discretion in the punishment of criminal offenders, the Eighth Amendment bars punishments that are "cruel and unusual" – that is, disproportionate when measured against "the evolving

standards of decency that mark the progress of a maturing society." *Atkins*, 536 U.S. at 311-12 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). In determining whether a punishment is disproportionate, "the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989). When a "national consensus" against a punishment exists, this Court may conclude that its imposition violates the Eighth Amendment's guarantee. *Atkins*, 536 U.S. at 314-17.

As this Court has warned, there is peril in applying this standard. Societal judgments about a particular punishment may shift over time, both in opposition and in support, as the recent history of capital punishment demonstrates. Courts thus risk prematurely declaring a settled societal consensus against a punishment, thereby depriving States of the ability to later revive it. *See Thompson v. Oklahoma*, 487 U.S. 815, 854-55 (1988) (O'Connor, J., concurring) (noting risk that a "mistaken premise of the decision would [be] frozen into constitutional law, making it difficult to refute and even more difficult to reject"); *Atkins*, 536 U.S. at 345 (Rehnquist, J., dissenting). Caution is therefore appropriate to ensure that the Eighth Amendment does not become "a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling the States from giving effect to altered beliefs and responding to changed social conditions." *Harmelin v. Michigan*, 501 U.S. 957, 990 (1991).

Mindful of this danger, this Court looks to several aspects of legislative acts to ensure that the Eighth Amendment is not used to constitutionalize a potentially fleeting public discomfort. The number of states that prohibit a particular

punishment is relevant. *See Stanford*, 492 U.S. at 370-72. Significance also lies in "the consistency of the direction of change." *Atkins*, 536 U.S. at 315-16. Additionally, the circumstances in which legislative determinations are made may indicate whether a judgment is likely to be enduring; for example, legislative prohibitions enacted gradually, over a long period of time, reflect the steady deliberation that should be present to invoke a constitutional bar against a punishment. *See Coker v. Georgia*, 433 U.S. 584, 593-94 (1977) (describing trend over fifty years toward barring capital punishment for rape of an adult woman). Likewise, prohibiting the imposition of a particular punishment, such as the death penalty, on a class of offenders that is otherwise exposed to tough treatment in the criminal justice system indicates a considered judgment that the punishment would be disproportionate as applied to those individuals. *Thompson*, 487 U.S. at 826-29.

The present legislative consensus against executing juvenile offenders has these hallmarks of an enduring national judgment. It is significantly more substantial than the legislative activity rejected as a basis for consensus in *Stanford*, and of longer vintage than the legislative determinations relied upon in *Atkins*. Accordingly, this Court should declare the consensus against the juvenile death penalty sufficiently broad to bar these executions.

I. The Legislative Consensus Against Executing Juvenile Offenders Is Widespread

A. *Thirty-One Jurisdictions Plus the Federal Government Bar the Execution of Juvenile Offenders*

This Court has twice addressed the question of when a legislative consensus is so broad as to place the execution of juvenile offenders beyond modern standards of decency. In 1988, a plurality of the Court held that imposing the death penalty on offenders who were 15 years old or younger at the time of their crimes had become "generally abhorrent to the conscience of the community." *Thompson v. Oklahoma*, 487 U.S. 815, 832 (1988). At that time, all 18 of the states that set minimum ages for the death penalty prohibited execution of offenders who were under 16 when they committed their crimes. *Id.* at 829 n.30. Nineteen other states set no minimum age for the death penalty, though some of them permitted criminal prosecution of offenders who were under 16 at the time of their crimes, thereby theoretically exposing these offenders to capital punishment. *Id.* at 826-27, 826 n.24. In the Court's view, these legislative judgments, coupled with a demonstrated reluctance by juries to sentence offenders who were under 16 at the time of their crimes to death, evidenced a national consensus against such executions.

In 1989, however, the Court concluded that a similar consensus barring execution of offenders who were 16 or 17 years old at the time of their crimes had not yet emerged. *Stanford*, 492 U.S. at 380. At that time, 11 of the 37 states that authorized capital punishment prohibited executing these

offenders;[2] seven expressly permitted it; and 19 set no minimum age for the death penalty but set the age of adult criminal liability at less than 18. *Id.* at 370-71.

In 1989, the Court also declined to declare a settled consensus against executing mentally retarded offenders, noting that only two states prohibited these executions. *See Penry*, 492 U.S. at 334. But it reached the opposite conclusion 13 years later, in *Atkins v. Virginia*, 536 U.S. 304 (2002). By that time, 18 states prohibited imposition of the death penalty on mentally retarded defendants, and in the years since *Penry*, no state had reauthorized these executions. *Atkins*, 536 U.S. at 314-16.

Today, 18 States expressly prohibit the execution of juvenile offenders,[3] the same number that constituted a

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2. In *Stanford* (as well as *Thompson*), the Court counted New Hampshire as one of the states that had set 18 as the minimum age for the death penalty, making the total number of such states 12. *See Thompson*, 487 U.S. at 829 n.30; *Stanford*, 492 U.S. at 370 n.2. New Hampshire's law, however, was not clear. *Compare* N. H. Rev. Stat. Ann. § 630:5(XIII)(1987)(prohibiting execution of one who was a minor at time of crime) and § 21-B:1 (age 18 is the age of majority) *with* § 630:1(V) (providing that no one under age 17 shall be held culpable of a capital offense). Subsequent legislative activity made clear that New Hampshire actually drew the line at 17, not 18. In 2004, a bill to raise the age to 18 passed both houses of the Legislature but was vetoed by the governor. *See* 2003 Bill Tracking NH S.B. 513.

3. Those states are California, Colorado, Connecticut, Illinois, Indiana, Kansas, Maryland, Montana, Nebraska, New Jersey, New Mexico, New York, Ohio, Oregon, South Dakota, Tennessee, Washington, and Wyoming. *See* Cal. Penal Code § 190.5; Colo. Rev.

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"national consensus" against executing other classes of offenders in both *Thompson* and *Atkins*. *Thompson*, 487 U.S. at 829; *Atkins*, 536 U.S. at 314-15. Since this Court decided *Stanford*, six more states (Indiana, Kansas, Montana, New York, South Dakota, and Wyoming) and the federal government have joined the 11 states that expressly exempted offenders who were less than 18 at the time of their crimes from capital punishment in 1989. *See* Ind. Code Ann. § 35-50-2-3; Kan. Stat. Ann. § 21-4622; Mont. Code Ann. § 45-5-102; N.Y. Penal Law § 125.27; S.D. Codified Laws § 23A-27A (pending amendment 2004); 2004 Bill Text SD S.B. 182; 2004 Wyo. Sess. Laws 29; 18 U.S.C. § 3591(a)(2)(D) ("Federal Death Penalty Act of 1994"). A seventh state, Washington, has imposed the same exemption through judicial act and legislative acquiescence: following *Thompson*, the Washington Supreme Court construed the state's statutory framework to disallow capital punishment of juvenile offenders, a conclusion lawmakers have not rejected through subsequent legislation. *See State v. Furman*, 858 P.2d 1092, 1102-03 (Wash. 1993). Twelve more states, plus the District of Columbia, do not permit the death penalty under any circumstances.[4] Thus, juveniles may

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Stat. § 18-1.4-102; Conn. Gen. Stat. Ann. § 53a-46a(h); 720 Ill. Comp. Stat. 5/9-1(b); Ind. Code Ann. § 35-50-2-3; Kan. Stat. Ann. § 21-4622; Md. Code Ann. Crim. Law § 2-202(b)(2)(i); Mont. Code Ann. § 45-5-102; Neb. Rev. Stat. § 28-105.01; N.Y. Penal Law § 125.27; Ohio Rev. Code Ann. § 2929.02; Or. Rev. Stat. §§ 161.620, 137.707; S.D. Codified Laws § 23A-27A, *amended by* 2004 Bill Text SD S.B. 182; Tenn. Code Ann § 37-1-134; *State v. Furman*, 858 P.2d 1092 (Wash. 1993); 2004 Wyo. Sess. Laws 29.

4. These states include Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin.

not be executed in a total of 31 jurisdictions plus the federal government (not counting Missouri), while only seven states (again not counting Missouri) explicitly permit these executions through legislative acts.[5]

Twelve other states set the age of adult criminal liability at less than 18, but set no minimum age by statute for imposing the death penalty.[6] Petitioner claims that because

5. Of these seven states, four allow the death penalty to be imposed only at 17. *See* Ga. Code Ann. § 17-9-3; N.H. Rev. Stat. Ann. § 630:1 (V); N.C. Gen. Stat. § 14-17; Tex. Penal Code § 8.07(c). The remaining three allow its imposition at 16. *See* Ky. Rev. Stat. Ann. § 640.040; Nev. Rev. Stat. § 176.025; Va. Code. Ann. § 18.2-10. Among these seven, neither Kentucky nor New Hampshire has any juveniles on death row. In fact, Kentucky has not executed a juvenile since 1945 and New Hampshire has never executed a juvenile offender. *See* Victor L. Streib, *Death Penalty for Juveniles*, Appendix at 196, 200 (1987).

6. *See* Ala. Code §§ 12-15-34, 12-15-34.1 (prosecuting juveniles as adults), § 15-18-1 (death penalty); Ariz. Rev. Stat. § 13-501 (prosecuting juveniles as adults), § 13-703 (death penalty); Ark. Code Ann. § 9-27-318 (prosecuting juveniles as adults), §§ 5-4-601 to 5-4-603 (death penalty), § 5-10-101 (capital murder); Del. Code Ann. tit. 10, § 1010 (prosecuting juveniles as adults), tit. 11, § 4209 (death penalty); Fla. Stat. Ann. § 985.226 (prosecuting juveniles as adults), § 985.225 (juveniles eligible for capital punishment) *Brennan v. State*, 754 So. 2d 1 (Fla. 1999) (prohibiting execution of offenders who were less than 17 at the time of their crimes); Idaho Code §§ 20-508, 20-509 (prosecuting juveniles as adults), § 18-4004 (death penalty); La. Child. Code art. 305, 857 (prosecuting juveniles as adults), La. Rev. Stat. Ann. § 14:30 (death penalty); Miss. Code Ann. §§ 43-21-151, 43-21-157 (prosecuting juveniles as adults), § 97-3-21 (death penalty); Okla. Stat. tit. 10, §§ 7306-1.1, 7306-2.6 (prosecuting juveniles as adults), tit. 21, § 701.10 (death penalty);
(Cont'd)

the laws of these states theoretically expose 16- and 17-year-olds to capital punishment, they should be considered supporters of the juvenile death penalty. *See* Pet'r Br. at 25. But for at least four of these states, that characterization is dubious. Arkansas, Delaware, Idaho, and Utah all permit adult criminal prosecution of some juvenile offenders as young as 14, and their death penalty statutes contain no age minimum.[7] However, Arkansas' last juvenile execution was in 1927, Delaware's was in 1891, and Utah's last and only juvenile execution occurred in 1869. *See* Victor L. Streib, *Death Penalty for Juveniles*, Appendix at 192-93, 206 (1987). Idaho has never executed a juvenile offender. *See id.* at 195. These states therefore have not had any reason to legislate against juvenile executions, and no support for such punishment can be inferred from their legislative inertia. *See Atkins*, 536 U.S. at 316 ("Some states . . . continue to authorize executions [of the mentally retarded], but none have been carried out in decades. Thus there is little need to pursue legislation barring the execution of the mentally retarded in those states.").

(Cont'd)
42 Pa. Cons. Stat. § 6355 (prosecuting juveniles as adults), 18 Pa. Cons. Stat. § 1102 (death penalty); S.C. Code Ann. §§ 20-7-6605, 20-7-7605 (prosecuting juveniles as adults), § 16-3-20 (death penalty); Utah Code Ann. §§ 78-3a-502, 78-3a-601, 78-3a-602 (prosecuting juveniles as adults), § 76-3-206 (death penalty).

7. *See* Ark. Code Ann. § 9-27-318 (juvenile transfer), § 5-4-615 (death penalty); Del. Code Ann. tit. 10, § 1010 (adult prosecution of juveniles), Del. Code Ann. tit. 11, § 4209 (death penalty); Idaho Code § 20-508 (juvenile waiver), § 18-4004 (death penalty); Utah Code Ann. § 78-3a-502(3) (juvenile waiver), § 76-3-206 (death penalty).

B. *Recent Enactments by the New York and Kansas Legislatures Reflect a Judgment By Those States Against Executing Juvenile Offenders*

In attempting to distinguish the breadth of the current legislative consensus against executing juvenile offenders from the consensus identified in *Atkins* against executing mentally-retarded offenders, petitioner suggests that recent enactments by New York and Kansas do not reflect deliberate legislative judgments on this point. *See* Pet'r Br. at 22-23. In *Thompson*, this Court characterized both states as not authorizing capital punishment at all in light of judicial decisions that had invalidated their death penalty schemes. *See* 487 U.S. at 826 n.25. For this reason, in *Stanford* the Court excluded New York and Kansas from the group of states that had made judgments against executing juveniles. 492 U.S. at 371. But now, as the Missouri Supreme Court recognized, both states must be counted as joining the consensus against juvenile executions that has emerged since that time.

New York has prohibited these executions for decades. In 1963, the New York Legislature enacted a statute expressly prohibiting the execution of minors, which was patterned after a provision of the Model Penal Code intended to make only those offenders who were 18 or older when they committed their crimes eligible for capital punishment. *See* Act of May 3, 1963, ch. 994, sec. 1, § 1045(3), 1963 N.Y. Laws 3018 (prohibiting imposition of death sentences on persons who committed their crimes when they were "under eighteen years of age"); James R. Acker, *When the Cheering Stopped: An Overview and Analysis of New York's Death Penalty Legislation*, 17 Pace L. Rev. 41, 50 (1996). This age limitation was retained through subsequent

amendments to New York's death penalty statute that were enacted in 1965 and 1967.[8]

Following this Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), New York's death penalty scheme was declared unconstitutional. *See People v. Fitzpatrick*, 32 N.Y. 499 (1973). In an effort to remedy the defect identified in *Furman* and *Fitzpatrick*, the New York Legislature enacted a new statute that imposed a mandatory death sentence for first-degree murder. *See* Act of May 17, 1974, ch. 367, sec. 2, § 60.06, 1974 N.Y. Laws 1209, 1209. In doing so, the Legislature retained a minimum age of 18 at the time of the crime's commission for the death penalty, but included this age restriction as one of the elements of first-degree murder, rather than as a free-standing prohibition – thereby reinforcing the judgment made 11 years earlier that capital punishment should be unavailable for offenders who were under 18 at the time of their crimes. *See id.* sec. 5, § 125.27(1)(b). The Legislature did not question whether the age requirement was appropriate: of the 29 death penalty bills introduced in 1973 (some of which were also reintroduced in 1974), none sought to lower the minimum age. *See* Bill Jacket, Act of May 17, 1974, 1974 Laws of New York, ch. 367, sec. 2, § 60.06, Office of Legislative Research, Feb. 1, 1974, "Capital Punishment: Can the Legislature Draft Constitutionally Acceptable Death Penalty Legislation" at 1.

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8. The 1967 amendment changed the wording of the age limitation slightly, to exclude defendants who were "more than eighteen years old at the time of the commission of the crime." Act of May 2, 1967, ch. 791, sec. 10, § 125.30(b), 1967 N.Y. Laws 2131, 2138. Apparently no change in the age of eligibility itself was intended. *See People v. Mower*, 280 A.D.2d 25, 28 (3d Dept. 2001) (interpreting "more than eighteen" as eighteen or more).

This revised death penalty regime was subsequently declared unconstitutional as well. *See People v. Davis*, 43 N.Y.2d 17 (1977). Thereafter, for eighteen consecutive years, the New York Legislature passed bills re-authorizing capital punishment, each of which fell to gubernatorial veto. *See* N.Y. State Legislative Annual, 1995, at 22-23. A newly-elected governor finally signed a death penalty bill into law in 1995. *See* 1995 Laws of New York, ch. 1 (S. 2850, A. 4843), March 7, 1995.

Contrary to petitioner's characterization, the 1995 statute does reflect a considered judgment against executing juvenile offenders. The statute significantly expands the categories of death-eligible offenders, *see* N.Y. Penal Law § 125.27, indicating that the Legislature made conscious choices about the appropriate scope of the death penalty and deliberately excluded juvenile offenders.

Legislative history confirms that this was precisely the Legislature's intent. *See* Floor Debate of the Assembly, Bill No. 4843 (March 6, 1995) at 126 ("[I]n the past, we have discussed who, in fact, from an age standard, should be subject to the death penalty, and this bill, about to become law, says no one under 18."); 210 ("You see there's a specific section in here that says you must be 18 or older . . . so we we're not going to kill our children and make them subject to the death penalty."); 529 ("[U]nder this bill, no one under 18 can be executed."); *see also* Governor's Approval Memorandum #1, N.Y. State Legislative Annual, 1995 at 23 (describing the bill as imposing the death penalty on only those above the age of 18); Assembly Codes Committee Memorandum, N.Y. State Legislative Annual, 1995 at 1, 3 (recognizing 18 as the minimum age for death penalty eligibility); Acker, *supra*, at 50. That there was no debate as

to the age limitation actually reflects broad agreement, not a lack of concern about the issue. Given these clear indicia of a considered legislative judgment, New York plainly should be counted as part of a national consensus against executing juvenile offenders.[9]

Missouri also suggests that this Court should discount Kansas, which, like New York, had no death penalty when *Stanford* was decided but has since rejoined the capital punishment states. *See* Kan. Stat. § 21-3439 (1994). Missouri asserts that the Kansas Legislature "did not deal specifically with offenders under eighteen." Pet'r Br. at 22. This is untrue. The original draft of the 1994 death penalty bill set the minimum age at 16. *See* Memorandum of Mary Ann Torrance, Assistant Revisor of Statutes (Kansas) to Kansas House Committee on Federal and State Affairs, "Provisions of House Bill No. 2578" (January 25, 1994). Legislators raised the minimum age to 18 by a committee vote during debate. *See* Minutes of the House Committee on Federal and State Affairs, February 7, 1994. The bill, as amended, passed a few days later. 1994 Kansas House Bill No. 2578; *see also* 1994 Bill Tracking KS H.B. 2578. The amended bill not only shielded juvenile offenders, *see* Kan. Stat. § 21-4622 (1994), but also in so doing reaffirmed a long-standing legislative

9. On June 24, 2004, the New York Court of Appeals invalidated, on state constitutional grounds, a charge given to capital juries regarding the impact of a deadlock, because the charge impermissibly interjects considerations of future dangerousness into the sentencing decision and could lead to coerced and potentially arbitrary death sentences. It further held that a jury deadlock charge is required in a capital case pursuant to the state due process clause, and concluded that the defect in the existing statute could only be cured by a new instruction from the State Legislature. *People v. LaValle*, No. 71, 2004 N.Y. LEXIS 1575 (June 24, 2004).

judgment that reaches back as far as Kansas' 1935 death penalty statute, which exempted juvenile offenders from the death penalty. *See* Kan. Gen. Stat. § 21-403 (1935) (repealed 1969).

II. The Emergence of the Legislative Consensus Against Executing Juvenile Offenders Has Been Gradual and Consistent

Petitioner attempts to dilute the significance of the legislative consensus against executing juvenile offenders by claiming that the direction of change among the states has been inconsistent. To the contrary, this consensus has emerged over a long period of time and has moved uniformly in one direction since *Stanford*. Not a single state that had a minimum age for capital punishment when this Court decided *Stanford* has lowered that age in the ensuing fifteen years.

The gradual nature of the shift in legislative judgments about executing juvenile offenders is noteworthy because it reflects steady deliberation over decades about this issue – surely a hallmark of a consensus that will endure. When legislative enactments are of recent vintage, a court may ask whether they reflect merely a temporary swing in public opinion, rather than a settled judgment of constitutional magnitude. *See Atkins*, 536 U.S. at 344 (Scalia, J., dissenting) (noting that state legislation prohibiting execution of mentally retarded offenders is "in its infancy" and thus "[f]ew, if any, of the States have had sufficient experience with these laws to know whether they are sensible in the long term"). The legislative prohibitions against executing juvenile offenders are of significantly longer duration than the legislative determinations relied upon to invoke an Eighth Amendment bar in *Atkins*. There, five of the 18 statutes found to constitute a national consensus against executing mentally

retarded offenders had been enacted in the year before the Court's decision; over half had been enacted in the previous eight years; and all had been enacted within the previous 14 years. *Id*. In contrast, by 1989 eleven states already had statutes barring execution of juvenile offenders.

Nor has the shift in public opinion since *Stanford* been inconsistent. In support of its argument on this point, petitioner refers to four states – Arizona, Florida, Virginia, and Missouri itself. *See* Pet'r Br. at 25-26. The legislative acts in these states, however, do not demonstrate a reversal in position as to whether offenders who were less than 18 when they committed their crimes should be executed.

In 1996, Arizona's voters amended their state constitution to mandate adult criminal prosecution for juveniles fifteen and older who are accused of murder and other specified violent offenses. *See* Ariz. Const. art. 4, pt. 2, § 22(1). The amendment made no mention of the death penalty. *Id*. Many states, including New York, have similar and even stricter provisions mandating adult prosecution, but as discussed in Point III, *infra*, such provisions do not necessarily reflect legislative support for executing juveniles. In fact, the Arizona Supreme Court overturned a death sentence imposed on a 16-year-old offender pursuant to the Arizona transfer provision, concluding that, under *Stanford*, this statute was unconstitutional insofar as it permitted prosecutors to seek the death penalty for juveniles without an individualized pre-trial assessment of the defendant's maturity. *State v. Davolt*, 84 P.3d 456, 480-81 (Ariz. 2004).

Nor does Florida's Legislature appear to have signaled any support for executing juvenile offenders. As petitioner points out, in 1994 the Florida Supreme Court invalidated a

15-year-old offender's death sentence as violative of the Florida Constitution's prohibition on "cruel *or* unusual" punishment, on the ground that such executions were "unusual." *Allen v. State*, 636 So. 2d 494 (Fla. 1994). That court later held that the same provision barred executions of offenders who were under seventeen at the time of their crimes on the same basis. *Brennan v. State*, 754 So. 2d 1, 7-8 (Fla. 1999). In 2002, Florida voters amended their state constitution to conform its standard to the federal Eighth Amendment. *See* Florida Const. art. I, § 17 (2004) ("The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution."). While claiming that this amendment reveals a preference for allowing the execution of juvenile offenders, petitioner offers no evidence of this motivation. *See* Pet'r Br. at 26-27. Notably, the Florida Legislature has not lowered the minimum age for imposition of the death penalty to 16, even though it could have done so following *Stanford*.

As for Virginia, it had no minimum age for capital punishment when *Thompson* and *Stanford* were decided, and in 2000 Virginia's Legislature simply made explicit that state's prior practice of allowing the execution of 16- and 17-year-old offenders. *See* Va. Code Ann. § 18.2-10(a) (amended in 2000). The Missouri Legislature passed a similar law in 1994, *see* Mo. Rev. Stat. § 565.020.2, the constitutionality of which is at issue here. While these enactments certainly reveal support for executing juvenile offenders, they do not represent a shift in the policies of those states since *Stanford*.

III. A Simultaneous Trend Toward Tougher Treatment of Juvenile Offenders Confirms That the Choice to Bar Execution of Juvenile Offenders Is Deliberate And Considered

In recent years, numerous states have drastically toughened their treatment of juvenile offenders by lowering the age at which these offenders may be tried and sentenced as adults. At the same time, however, there has been a trend in many of these states toward explicitly prohibiting execution of these offenders. This dynamic suggests first, that explicit legislative prohibitions against the juvenile death penalty are deliberate and considered, and second, that states which expose juvenile offenders to the death penalty solely by virtue of placing them in the criminal justice system should not be viewed as having expressed any judgment on the execution of these offenders.

In the 1990s, many states enacted stricter juvenile justice laws in response to a perceived juvenile crime crisis. *See* Howard N. Snyder and Melissa Sickmund, United States Department of Justice, Office of Juvenile Justice and Delinquency Prevention, *Juvenile Offenders and Victims: 1999 National Report* 89 (1999), *available at* http://www.ncjrs.org/html/ojjdp/nationalreport99/ (Sept. 1999) (hereinafter *Juvenile Offenders and Victims*) (describing the 1990s as "a time of unprecedented change as State legislatures crack[ed] down on juvenile crime"). While prior laws had focused on rehabilitation of juvenile offenders and provided separate courts for juveniles, the new movement emphasized punishment and deterrence. *See* Julian V. Roberts, *Public Opinion and Youth Justice*, 31 Crime & Just. 495, 521 (2004); Jennifer A. Chin, *Note: Baby-Face Killers: A Cry for Uniform Treatment for Youths who Murder, from Trial to Sentencing*, 8 J.L. & Pol'y 287, 292-95 (1999).

As a result, all states now place at least some juvenile offenders in the adult criminal justice system. Between 1992 and 1997 alone, forty-five states passed laws making it easier to transfer offenders who are less than 18 to the adult criminal justice system. *See Juvenile Offenders and Victims* at 89, 104. Legislatures in 18 states expanded the scope of transfer laws still more between 1998 and 2002. Patrick Griffon, National Center for Juvenile Justice, "National Overviews," *State Juvenile Justice Profiles*, *available at* http://www.ncjj.org/stateprofiles/ (last visited July 19, 2004). Today, juvenile court judges in nearly all states may transfer matters to adult criminal courts, sometimes even for children as young as ten or twelve. *See Juvenile Offenders and Victims* at 104; *see also* Vt. Stat. Ann. tit. 33 §§ 5506, 5505 (permitting transfer of children as young as 10); Colo. Rev. Stat. § 19-2-518(1)(a)(I)(A) (permitting adult prosecutions of certain 12-year-olds); Mont. Code Ann. § 41-5-206(1)(a)(same). Some states have divested the juvenile courts of jurisdiction altogether for offenders of a certain age or for certain types of crimes, making transfer unnecessary. Connecticut, New York, and North Carolina, for example, automatically treat all offenders 16 and older as adults, regardless of their alleged crimes. *See* Conn. Gen. Stat. § 46b-120; N.Y. Penal Law § 30.00(1); N.C. Gen. Stat. § 7B-1604. Currently, statutes in over 30 states exclude at least some categories of juvenile offenders from prosecution in juvenile courts.[10]

10. *See, e.g.*, Ala. Code § 12-15-34.1; Cal. Wel. & Inst. Code § 602b; Fla. Stat. Ann. § 985.226; Ga. Code Ann. § 15-11-28(b)(2)(A); Idaho Code § 20-509; 705 Ill. Comp. Stat. 405/5-805(1), 405/5-125; Ind. Code Ann. § 31-30-1-4; Iowa Code § 232.8; La. Child. Code art. 305; Md. Cts. & Jud. Proc. § 3-8A-03; Mass. Gen. Laws ch. 119, § 74; Minn. Stat. §§ 260B.007(6)(b), 260B.101(2); Miss. Code Ann. § 43-21-151; Mont. Code Ann. (Cont'd)

Many states have also stiffened the sentences applicable to juveniles; 16 states now require mandatory minimum terms of incarceration for some juvenile offenders. *Juvenile Offenders and Victims* at 89, 108 (describing enactments during period between 1992 and 1997).

While many states thus have indicated their willingness to hold more juvenile offenders criminally liable at younger ages, the converse has been true about their willingness to allow the execution of juvenile offenders. All of the 18 capital punishment states that expressly shield juvenile offenders from the death penalty require or allow juveniles charged with murder to be prosecuted as adults.[11] Some of these states have particularly long-standing prohibitions against executing juvenile offenders. For example, California

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§ 41-5-206(2); Nev. Rev. Stat. § 62B.330(3); N.M. Stat. Ann. § 32A-2-3(H); N.Y. Penal Law § 30.00; N.C. Gen. Stat. § 7B-2200; N.D. Cent. Code § 27-20-34; Ohio Rev. Code Ann. §§ 2152.10, 2152.12; Okla. Stat. tit. 10 § 7306-1.1; Or. Rev. Stat. § 137.707; 42 Pa. Cons. Stat. Ann. § 6355(e); R.I. Gen. Laws § 14-1-5; S.C. Code Ann. §§ 20-7-6605, 20-7-7605; S.D. Codified Laws § 26-11-3.1; Utah Code Ann. § 78-3a-601; Vt. Stat. Ann. tit. 33 § 5502; Va. Code Ann. § 16.1-269.1; Wash. Rev. Code § 13.04.030; W. Va. Code Ann. § 49-5-10; Wis. Stat. Ann. § 938.183.

11. *See* Cal. Welf. & Inst. Code § 602; Colo. Rev. Stat. §§ 19-2-518, 18-1.3-406; Conn. Gen. Stat. § 46b-127(a); 705 Ill. Comp. Stat. 405/5-130; Ind. Code Ann. § 31-30-3-5; Kan. Stat. Ann. § 38-1636; Md. Cts. & Jud. Proc. § 3-8A-03(d)(1); Mont. Code Ann. § 41-5-206; Neb. Rev. Stat. § 43-247; N.J. Stat. Ann. § 2A:4A-26; N.M. Stat. Ann. §§ 31-18-15.2(A), 32A-2-20; N.Y. Penal Law § 30.00; Ohio Rev. Code Ann. § 2152.10; Or. Rev. Stat. § 137.707; S.D. Codified Laws § 26-11-3.1; Tenn. Code Ann. § 37-1-134; Wash. Rev. Code § 13.04.030; Wyo. Stat. Ann. § 14-6-203.

mandates adult prosecution of teens as young as 14, *see* Cal. Wel. & Inst. Code § 602(b), but has barred execution of juvenile offenders since 1921. *See People v. Davis*, 176 Cal. Rptr. 521, 528 (Cal. 1981). Colorado, which has prohibited execution of juvenile offenders since 1901, *see* Act of May 2, 1901, § 6, 1901 Colo. Sess. Laws 155-56, permits adult prosecution of children as young as 12. Colo. Rev. Stat. § 19-2-518.

Even more significantly, a number of the states that recently stiffened penalties for juveniles have, at the same time, *increased* to 18 the minimum age of commission of a crime for which an offender may be death-eligible. For example, Indiana enacted a statute in 1997 permitting the transfer to the adult system of children as young as 10 who are accused of murder. Ind. Code Ann. § 31-30-3-4. But in 2002, it also prohibited the execution of juvenile offenders, raising the minimum age of offense for death penalty eligibility from 16 to 18. Ind. Code Ann. § 35-50-2-3(b)(1)(A). Similarly, Kansas, which explicitly exempted offenders who committed their crimes at less than 18 when it reinstated the death penalty in 1994, Kan. Stat. Ann. § 21-4622, permits adult prosecution of children as young as 10, Kan. Stat. Ann. §§ 38-1602(a), 38-1636. Wyoming, another state that recently banned the death penalty for offenders under 18, 2004 Wyo. Sess. Laws 29, permits adult criminal prosecution of children as young as thirteen, Wyo. Stat. §§ 14-6-203, 14-6-237.

New York, too, has been increasingly tough on juvenile offenders, while reaffirming its position against executing these offenders. Since 1965, 16- and 17-year-old offenders have been prosecuted automatically as adults in New York. N.Y. Penal Law § 30.00(1). In 1978, New York extended this

policy to younger teens, mandating that in the absence of a waiver, 13-year-olds charged with second degree murder automatically face adult criminal liability, as do 14-year-olds charged with a variety of crimes, including kidnaping, manslaughter, rape, arson, and robbery. N.Y. Penal Law §§ 10.00(18), 30.00(2); *see also* 1998 N.Y. Laws 3282 (providing for automatic adult criminal prosecution of 14-year-olds charged with possession of a loaded firearm on school grounds). Additionally, in 2003, New York raised the minimum sentence for 14- and 15-year old offenders convicted of second degree murder to 7½ to fifteen years; the maximum sentence for these offenders remains life in prison. N.Y. Penal Law § 70.05; 2003 N.Y. Laws, ch. 174. Thus, the New York Legislature has decided that juvenile offenders may spend the rest of their lives in prison, but it is not permissible to execute them.

The combination of these two trends in New York, as well as in a number of other states, provides compelling evidence that legislative judgments against executing juvenile offenders are considered ones. Many states treat juvenile offenders just as they do adults, but make an exception when it comes to the death penalty. The deliberateness of this choice indicates that the consensus against these executions will be enduring, and thus they may appropriately be prohibited under the Eighth Amendment.

It also suggests that the decision to lower the age at which juvenile offenders may or even must be treated as adults says nothing conclusive about a legislature's view of the minimum age at which they may be executed. In finding that no consensus against the juvenile death penalty existed in *Stanford*, this Court relied on the assumption, first set forth in *Thompson*, that when a legislature lowers the age at which

a juvenile offender may be tried as an adult, it necessarily intends that the offender also be exposed to the death penalty. *See Thompson*, 487 U.S. at 867-68 (Scalia, J. dissenting); *Stanford*, 492 U.S. at 370, 371 n.3; *id.* at 381 (O'Connor, J., concurring). But as Justice O'Connor noted in *Thompson*, "[t]here are many reasons, having nothing whatsoever to do with capital punishment, that might motivate a legislature to provide as a general matter for some 15-year-olds to be channeled into the adult criminal justice process." 487 U.S. at 850 (O'Connor, J., concurring).

The experiences of the Amici States and of the nation as a whole in the 15 years since *Stanford* demonstrate that this Court need not fear that invalidating the juvenile death penalty now will prematurely constrain the states. If ever there were a period in which states, looking for ways to treat juvenile offenders more harshly, might have considered reducing the age at which offenders become death-eligible, it was the period following *Stanford*. And yet, uniformly, the states made no such move. Their mutual decisions to draw the line at death, even where public opinion supported tough punishment of juvenile offenders and legislatures responded accordingly, suggest that the consensus baseline of 18 is immovable.

CONCLUSION

For the foregoing reasons, the Amici States urge this Court to affirm the decision of the Missouri Supreme Court.

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